

# EXHIBIT C

- 113 -

1 docket to see if there was an adversary proceeding filed. I  
2 agree with that.

3 But let me ask. The Supreme Court this year talked  
4 about notice for due process purposes in the Espinosa case.  
5 And they said that actual notice of the plan was enough, even  
6 though it was the plan that improperly dealt with the  
7 nondischargeable student loan. That was -- it was enough to  
8 take it out of 60(b)(4) and was, you know, was sufficient due  
9 process. How is this different from that?

10 MS. SCHWEITZER: Well, what I think is different is  
11 that the concern here is that you're taking a process and  
12 taking literal procedures and turning on the head the  
13 expectations of all parties involved in that process. What  
14 you're saying is I'm going to file a plan on you, right, and  
15 I've got my plan disclosure statement in the mail.

16 The exhibit is missing on retained actions. Thirteen  
17 days before the objection deadline, I'm going to file a notice  
18 of plan supplement on the docket that lists docket numbers, not  
19 actual case names, docket numbers, and if you, when you get  
20 served by mail in the thirteen days before the confirmation  
21 deadline, go to look up that exhibit, you're going to find a  
22 link again to 177 docket numbers out of 11,000 potential  
23 claims. You're going to go to those links and you're going to  
24 hit a roadblock.

25 And so in those last ten days, if you really do

- 114 -

1 consider yourself on notice and you really did want to look  
2 into this, you're running against the wall and you're running  
3 against the wall to find out that the debtors have, in fact,  
4 sued you two and a half years earlier.

5 Now, I understand there are things in bankruptcy that  
6 are sometimes preferable notice, the best possible notice  
7 versus minimally adequate notice, but the difference here is  
8 the debtors didn't merely say, 'I want to tell -- give people  
9 comfort that, look, I filed this against you, I don't really  
10 mean it.' Or, 'I don't know if I mean it. Let's all sit  
11 tight, let's all join the benefit of the breather and the  
12 benefit of working through whether these are meritorious claims  
13 and we can all do that together.' The debtors, instead,  
14 unilaterally, at every turn, said, 'I'm not going to tell you.'  
15 And the due process cases around planned disclosure and the res  
16 judicata cases around planned disclosure generally say, 'Well,  
17 if the debtor preserves everything, everyone knows they're  
18 affected.' Right? Or if was just too burdensome for the  
19 debtor that they couldn't really possibly have gone through and  
20 sorted out the cases so early on in their proceeding, we're  
21 going to give them a little slack.

22 But here the debtors knew exactly what they were  
23 preserving. And they didn't serve that plan exhibit on anyone.  
24 They didn't unseal the dockets at that point. They didn't even  
25 ask for effective relief to seal the dockets in the context of

- 115 -

1 the plan or to seal a schedule in the plan that would have  
2 listed the peoples' names. What they said was, 'Oh, we already  
3 got that relief a year and a half earlier and we're going to  
4 get it again after the plan is confirmed because it worked so  
5 well. Let's just keep doubling down', all on the principal of  
6 'We're protecting ongoing business relationships.'

7 And to say to people that you, as the defendant, have  
8 to be on the watch and you have to come forward when you think  
9 something unjust is happening, really shifts the burden on you.  
10 You're saying you don't just have a burden to defend against  
11 claims; you have a burden to actively monitor dockets and  
12 actively ferret out when the debtors are doing things contrary  
13 to your expectations. Not just things that they would  
14 ordinarily would be entitled to do, but when they're actually  
15 burying claims and putting them to the back of the road, well  
16 beyond the initial purpose which was just status quo and  
17 nonprejudice. Now, you have to spend the time and money -- at  
18 what point is a creditor allowed to tell their attorneys, 'Stop  
19 spending money.'?

20 I mean, doing the same math they had given you, if you  
21 look at the third extension that was after the plan, you get  
22 over to a million dollars in monitoring the docket, spending  
23 fifteen minutes a pleading; whether it's the plan or any other  
24 motion, times the number of 13,000 motions. You're talking  
25 about over a million dollars -- and you're smiling because the

- 116 -

1 answer is no one spends a million dollars monitoring these  
2 cases --

3 THE COURT: No, I know, but no one spends fifteen  
4 minutes on every pleading, either. You know that that --

5 MS. SCHWEITZER: Take it in half, take it in a  
6 quarter, take it in a eighth; tell me my rates are outrageous  
7 at 500 dollars an hour. I'm fine with that, but you're telling  
8 the clients, every one of these 11,000 transferees, that they  
9 have to spend the time monitoring all 13,000 pleadings to make  
10 sure there's no 'Gotcha' in there, to make sure the debtor is  
11 not still holding on to a claim against them. Because it's not  
12 only the 177 that survived, in the debtors' world --

13 THE COURT: Well, what --

14 MS. SCHWEITZER: -- it's all 11,000 people.

15 THE COURT: -- I guess what's missing here is the  
16 ability to know whether any of these movants got actual notice.  
17 I mean, I find it hard to believe that none of them was aware  
18 of what was going on.

19 MS. SCHWEITZER: Well, I think there are different  
20 levels of "aware of what was going on". I think there's a  
21 level of 'I didn't know anything that was going on because I  
22 didn't even know that Delphi was in bankruptcy.' Right? I  
23 mean, there's that level.

24 THE COURT: Right.

25 MS. SCHWEITZER: There's 'I knew that Delphi was in

- 117 -

1 bankruptcy but I didn't know about the statute of limitations'  
2 or 'I did know and I didn't see this motion' or 'I didn't  
3 understand this motion'. And then there are people who got the  
4 motion in the mail, maybe, maybe not, but even people who got  
5 the motion in the mail, did they really know that they were a  
6 defendant? And I don't think the debtors have ever suggested  
7 that they voluntarily told anyone. And I can certainly say for  
8 my clients, it wasn't the typical case where you get the letter  
9 in the mail warning you.

10 THE COURT: But it's the -- for me to dismiss all of  
11 these complaints on this theory, it has to apply to that last  
12 group, right? Someone that got it in the mail, maybe even put  
13 two and two together and said, 'Oh, I may be at risk here.  
14 Well, I'll just, you know, I'll let it go by.' Isn't it the  
15 case that to dismiss these complaints, I have to -- on these  
16 motions, I have to find that?

17 MS. SCHWEITZER: I think you have to find that the  
18 debtors -- and, again, this is where it looks back to the due  
19 process issues, is that the debtors' wholesale took a position  
20 and created a strategy which whatever good intentions they had  
21 when they first asked for it and whatever their intentions were  
22 even in the spring of 2008, took you down the path where the  
23 wholesale matter -- it's unfair to let these proceedings go  
24 forward. And particularly when you see the complaints that are  
25 at hand because this isn't over in terms of figuring out how

DPH HOLDINGS CORP., et al.

- 118 -

1 we've been sued and what the notice is. When you look at the  
2 sufficiency of the complaints --

3 THE COURT: Well, that's a separate issue. I  
4 understand that issue. That's a separate issue.

5 MS. SCHWEITZER: I think it's a separate issue, but I  
6 think that -- I mean, first, my answer would be yes. You can  
7 take notice of the fact that there's a passage of time, that  
8 there's been not only two things, a lack of notice -- a lack of  
9 adequate notice, and not only a lack of notice but a concerted  
10 effort to hide the complaints, coupled with the fact of the  
11 passage of time and the things that have happened over that  
12 time, the defendants didn't have an opportunity during this  
13 time to use those complaints to their advantage, quite frankly.  
14 That the -- whether to get information from the debtors before  
15 the business were sold and, quite frankly, taking the debtors'  
16 explanation at face value, 'We wanted to preserve business  
17 relationships because we didn't want adverse consequences to  
18 flow from the knowledge that these complaints existed.'

19 What did that mean? People could have said, 'I'm  
20 doing business with you and I don't want to keep doing business  
21 with you.' 'I'm doing business with you but I want these  
22 claims settled, as a part of doing business with you.' 'I'm  
23 not doing business with you, but I would happily trade away  
24 some of these claims for doing business with you.' 'I got a  
25 plan in the mail but you know what? Everything is going so

1 smoothly with you, I'm going to say' --

2 THE COURT: But, again, isn't that on a case-by-case  
3 basis? I mean, I -- as far as I can see, there's one case that  
4 concludes that 4(m) relief was improperly granted and that case  
5 wasn't on due process grounds. The Ninth Circuit just said,  
6 'You know, we don't really set a standard for when it's  
7 improperly granted, but it was improperly granted.' So, I  
8 mean, it just seems to me that it's much more of a case-by-case  
9 analysis, depending on the, you know, the harm that happened to  
10 people.

11 MS. SCHWEITZER: Right. Well, I guess --

12 THE COURT: With the exception -- let me stop you.

13 MS. SCHWEITZER: Okay.

14 THE COURT: With the exception that under Rule  
15 60(b)(4), if someone really didn't get notice of the extension  
16 motions, then it would seem to me they should be able to argue  
17 to me as if the motions were being made right now, although  
18 I'll hear the debtors on that. But, that seems to be the way  
19 to look at it.

20 MS. SCHWEITZER: Right. Well, Your Honor --

21 THE COURT: And then, the notice that would trigger  
22 the Rule 60(b)(4) analysis would be due process notice and  
23 consistent with not only Espinosa, but Mulane and the like.  
24 It's true, if -- if the notice was buried or confusing or the  
25 like, then I would understand that, too, as a violation of due

- 120 -

1 process. I mean, a Chapter 13 plan is probably a little easier  
2 to deal with than a case that probably has a hundred docket  
3 entries, than thousands.

4 MS. SCHWEITZER: Well, I would certainly take the  
5 position that you're in a position to find a per se violation  
6 but I do believe that there are facts of prejudice that  
7 ultimately could and would be shown. And I've highlighted some  
8 of those and I think some of those are universal but in the  
9 interest of not stepping on Mr. Winsten's time and also --

10 THE COURT: Okay.

11 MS. SCHWEITZER: -- recognizing that there are other  
12 arguments to be had, I think that if it's all right with Your  
13 Honor, I'd move to the Rule 8 arguments.

14 THE COURT: Well, who is -- okay. But --

15 MS. SCHWEITZER: Or would you like Mr. Winsten --

16 THE COURT: -- I'm happy to get to those, I just --  
17 who is covering Rule 4(f)?

18 MS. SCHWEITZER: Mr. Winsten.

19 THE COURT: Okay. So, I'll wait for you, then.

20 MS. SCHWEITZER: Would you like --

21 THE COURT: So, no, no --

22 MS. SCHWEITZER: -- I'd be happy to cede the podium --

23 THE COURT: -- Rule 8 --

24 MS. SCHWEITZER: I'm happy to cede the podium in any  
25 order --

- 121 -

1 THE COURT: I just don't -- I don't want to -- no,  
2 actually, I should really hear from the debtors on this point  
3 so that it doesn't get stale by the time they speak.

4 MS. SCHWEITZER: Okay, that's fine, Your Honor.

5 THE COURT: Okay? Okay. Which is, again, the due  
6 process point and, as I view it, that's really two separate  
7 points. One is whether the simple fact that these complaints  
8 were kept under seal and were not served until years after the  
9 statute of limitations is a violation of due process. And then  
10 secondly, whether there was insufficient notice for due process  
11 purposes of the extension motions and therefore they can be  
12 heard as if, you know, in essence, the orders are void or they  
13 should be considered brand new, on a brand new basis.

14 MR. FISHER: Your Honor, to begin by addressing just  
15 precisely those two points and then perhaps just to address  
16 more broadly some of the points that Ms. Schweitzer raised.

17 THE COURT: Okay.

18 MR. FISHER: Your first question, Your Honor, is  
19 whether the fact that these complaints were filed under seal  
20 before the statute of limitations but then not unsealed and  
21 served until years later is itself some kind of per se  
22 violation of due process. Of course, our position is that that  
23 is not the case. There is no violation of due process here.

24 And the reason for that is because the right to repose  
25 is simply not a recognized liberty interest, as Your Honor has

1 pointed out, under the Constitution. And it's also the case  
2 that all the movants -- the movants have not cited a single  
3 case in which that kind of violation is a deprivation for  
4 purposes of due process. And as a threshold matter, in order  
5 to find a due process violation, Your Honor would have to find  
6 that the movants' Constitutional rights had been deprived in  
7 some way as a result of this procedure. They haven't been.

8 What we're talking about here, Your Honor, is not the  
9 deprivation of a Constitutional right, but we're talking about  
10 litigation prejudice. And Courts deal with litigation  
11 prejudice all the time and we don't mean in any way to minimize  
12 the possibility that certain movants very well may have  
13 suffered certain kinds of prejudice as a result of the  
14 extensive delay here in unsealing and serving the complaints.

15 THE COURT: Well, is it just litigation prejudice?  
16 Can't it be other prejudice, too? For example, someone that  
17 bought a company in reliance on the limitations period expiring  
18 if the, you know, where there's a very large claim?

19 MR. FISHER: So, that's a fair point. With respect to  
20 the overwhelming majority of movements (sic), the kinds of  
21 prejudice that are raised are witness' memories have faded or  
22 documents may no longer be available. And I would note that  
23 overwhelmingly, those representations are couched in the  
24 permissive: "This may have happened." So, in and of itself,  
25 the claim of litigation prejudice at this point, in so many of

1 the motions, is speculative. But, of course, to the extent  
2 that that kind of prejudice can be shown on a case-by-case  
3 basis, the Court will need to fashion ways to deal with the  
4 consequences of that prejudice and protect any particular  
5 movant from the consequences of that prejudice, on a case-by-  
6 case basis.

7 With regard to other claims of prejudice, again, Your  
8 Honor, such as the example that you raised where an entity  
9 purchased this business without knowledge and without reason to  
10 know that these preference claims had been filed against the  
11 purchased entity, that is a claim of prejudice that needs to be  
12 addressed in its own right, on a case-by-case basis. It's  
13 certainly not a per se -- it's not a Constitutional issue, but  
14 it is prejudice that would need to be addressed.

15 THE COURT: Okay. What about the notice of the actual  
16 motions, the extension motions?

17 MR. FISHER: So, Ms. Schweitzer described a range of  
18 kinds of notice that various movants may have gotten. And I  
19 suppose that the extreme case which really puts a point on the  
20 question is the case which I expect Mr. Gottfried will speak  
21 to, but you know, the case of Wagner-Smith, for example, where  
22 that entity was not a creditor, wasn't on the creditor matrix  
23 and, as far as we know, didn't receive actual notice of the  
24 preservation order. And even in that case, Your Honor, I would  
25 say that there is no Constitutional deprivation; this is not a

1 Constitutional issue. And the reason is because --

2 THE COURT: No, but wouldn't -- because there wasn't  
3 such notice, wouldn't the order not be effective as to them?

4 MR. FISHER: The reason I don't think so, Your Honor,  
5 is because under the Rules -- and I think that these orders,  
6 the first preserva -- we're talking about four orders; the  
7 first preservation order, which is the only order that directed  
8 sealing and then extended the 4(m) deadline for the first time,  
9 and then there were three extension orders that modified that  
10 first order only with respect to the 4(m) deadline and any  
11 other elements of that first order remained intact.

12 With regard to sealing and with regard to 4(m),  
13 there's no requirement of notice. Typically, in the 4(m)  
14 context, or often in the 4(m) context, there's no notice to the  
15 named defendant; the complaint hasn't been served yet.  
16 Frequently, a defendant cannot be located. But even where a  
17 defendant potentially could be located, under Rule 6, where  
18 someone moves for an extension of a deadline before expiration  
19 of that deadline, which is what happened here -- I mean, yes,  
20 there was extensive delay with regard to the unsealing and  
21 service of these complaints, but the debtors were diligent with  
22 respect to making sure that the deadlines were protected and  
23 for seeking relief from this Court in advance of the expiration  
24 of each 4(m) deadline. There's no notice that's required. And  
25 under Bankruptcy Rule 9018 which governs sealing, similarly,

1 there's no notice that's required.

2 So, in the absence of a notice requirement and in the  
3 absence of proof of a deprivation, I don't see how there can be  
4 a due process violation. And I don't think that movants in  
5 that position should be entitled to return to these orders as  
6 though they had never been entered and make new arguments with  
7 respect to those orders.

8 THE COURT: But if you know the party is affected by  
9 the relief, aren't they entitled to notice under 4(m)?

10 MR. FISHER: Well, what's curious here, Your Honor, is  
11 that -- and this goes to the rationale for sealing. What  
12 was -- these complaints don't contain state secrets; they  
13 contain basic information about preferential transactions with  
14 a whole host of defendants, most of which who were then current  
15 suppliers to Delphi. And it is, in fact, the fact that they  
16 were named as defendants in the lawsuit. That was the kind of  
17 information that Delphi intended to seal and that is -- and the  
18 reason is twofold. It wasn't just because we didn't want to  
19 disrupt then-current supplier relationships; although that is a  
20 very important reason, because maintaining the supplier  
21 relationships was critical to the reorganization proceeding.

22 THE COURT: I understand your argument, but since they  
23 didn't have the chance to respond to it, how should they be  
24 bound by that order? Since you knew who they were. I mean,  
25 why wouldn't it be covered by 60(b)(4)?

1 MR. FISHER: I return, Your Honor, to Rule 6(b) and  
2 Rule 9018, which provides that notice wasn't required. And at  
3 the end of the day, what happened to those movants, even the  
4 rare movant who will claim that it didn't have any notice, is  
5 that they are now subject to a complaint that was timely filed  
6 but not served until well after expiration of the statute of  
7 limitations. And as a technical matter that's justified under  
8 the Rules, to the extent that they've suffered any kind of  
9 prejudice, that prejudice can and will be addressed by the  
10 Court in the future, when the case is at an appropriate  
11 juncture to do so.

12 Your Honor, I'd like to return to just some of the  
13 points that Ms. Schweitzer made and respond to those, unless  
14 Your Honor has additional questions on these two specific  
15 points.

16 THE COURT: Well, 9006(b) requires a showing of cause,  
17 right? And I guess the issue I have there is if they are not  
18 given notice of anything that would let them know that this is  
19 going on, how could one say that they are bound by an order  
20 that says that it's for cause? It means that they never had  
21 the right either to dispute that or to appeal it.

22 MR. FISHER: The -- first of all, Your Honor, as Your  
23 Honor's aware, 4(m) does not require a showing of cause.

24 THE COURT: I understand --

25 MR. FISHER: But with regard to the 6(b) question, the

- 127 -

1 determination of cause was independent of what any movant would  
2 say. And that dovetails with the sealing because to invite  
3 particular defendants into court and to say, 'You're the  
4 subject of a preference action and we're going to put these on  
5 hold for a while and if you have anything to say about that,  
6 you know, come to court and be heard' defeats the purpose of  
7 sealing.

8 THE COURT: But they didn't know of it for the appeal  
9 purposes either, right? Anyway, I'll hear from the defendants  
10 on this one. You can go to the other points -- when you talk  
11 on the other point.

12 MR. FISHER: I think Ms. Schweitzer began by talking  
13 about the history of the case. And I think that in some sense,  
14 as between the movants and the reorganized debtor -- debtors,  
15 there are dueling versions of history here. And the movants  
16 are writing a kind of revisionist history. Of course, from  
17 2005 until Delphi emerged from bankruptcy in October 2009, the  
18 spotlight was on the rehabilitation of Delphi and its emergence  
19 from bankruptcy.

20 And now, we're out of that, and we're looking at these  
21 claims that were preserved during the course of the  
22 reorganization proceedings and asking what have the practical  
23 consequences of that preservation been and how do we address  
24 those consequences. But the suggestion that there was, at any  
25 point, some intent to delay or some intent to cause litigation

1 harm to any party, is misplaced.

2 And when counsel referred to this Goldilocks idea that  
3 at first the debtors had so much money that it made sense to  
4 keep these cases under seal and not cause people to needlessly  
5 incur expenses and not impose those expenses on the debtor,  
6 because they were unlikely to ever be pursued, and then later  
7 the debtor had so little money that it would have been  
8 impossible and threaten the reorganization to be spending time  
9 and money prosecuting those cases, I think that that gives  
10 short shrift to what really happened in the course of the  
11 bankruptcy. And the truth is that as a result of these sealing  
12 orders, there are at least 565 named defendants who are not  
13 being prosecuted, who are not incurring costs to defend  
14 litigation, who are not imposing costs on the estate with  
15 regard to the prosecution of the litigation. And were it not  
16 for the sealing orders, there'd be a very different picture.

17 I think that when the Court looks at each order in its  
18 context, it will be clear that there was a record sufficient to  
19 justify entry of each order. And what the movants are seeking  
20 today, which is essentially to go back and truly rewrite  
21 history and vacate these four orders, talk about prejudice. I  
22 mean the ultimate prejudice here would be to DPH, which  
23 conscientiously tried to take steps to ensure that these  
24 valuable assets -- potentially valuable assets of the estate,  
25 would be preserved, in the event that it became necessary to

1 prosecute those actions.

2 To now go back and rewrite history and say that those  
3 orders that were properly entered and that were relied upon by  
4 the debtors are going to be undone, would deprive the  
5 reorganized debtors of enormously valuable claims after the  
6 fact. And I think that because we're not talking about a  
7 constitutional issue here, we ought to be talking about a  
8 balancing of prejudice. And I think, on the one hand, the  
9 prejudice to the reorganized debtors is extreme, because the  
10 consequences would be the wholesale loss of these claims that  
11 they attempted to preserve conscientiously through motions to  
12 this Court and validly entered orders of this court, on the one  
13 hand; and on the other hand, a host of movants who are  
14 differently situated, each of them suffering particularized, or  
15 claiming --

16 THE COURT: But the response is going to be, how could  
17 Delphi rely upon relief that was obtained without proper  
18 notice. I mean, that's going to be the response. No lawyer  
19 would rely on it.

20 MR. FISHER: Well, Your Honor, as to the vast majority  
21 of these cases, I don't think that there's a serious question  
22 as to notice. I mean, these -- the motions were served to the  
23 entire creditor matrix. They were entered on the docket. The  
24 plan and disclosure statement, it didn't require monitoring the  
25 docket. It was a public filing attached to Delphi's 8-K in

- 130 -

1 December 2007. The preservation order provided that Delphi  
2 could disclose the name of any particular defendant, if that  
3 defendant inquired.

4 And so there was a fair amount of notice here to the  
5 parties. Also it was noted on the record with regard to the  
6 first preservation motion and thereafter, that this entire  
7 procedure was reviewed by both statutory committees, which is  
8 an important thing to remember, because, of course, we're  
9 talking in the first instance, about a context in which there's  
10 an equity committee, and there's an expectation that everyone's  
11 going to be paid in full and that all of these cases are going  
12 to go away.

13 THE COURT: Well, the equity committee reviews really  
14 doesn't help at all. But the creditors' committee review has  
15 some -- helps your case somewhat.

16 MR. FISHER: The creditors' committee reviewed it.  
17 They have fiduciary duties to all of the unsecured creditors.  
18 They did not object. They approved the procedures. And notice  
19 was disseminated to the entire creditor matrix. It was very  
20 widespread notice. There may be -- I'm aware of Wagner-Smith,  
21 and we'll hear from Mr. Gottfried. There may be a defendant  
22 that received no notice. But even there, as I've already  
23 argued, I don't think that notice was required under the rules  
24 with respect to the relief that was being sought, which is  
25 sealing and a 4(m) extension.

- 131 -

1 THE COURT: Sealing of the complaints?

2 MR. FISHER: Yes, sealing of the complaints.

3 THE COURT: All right. Okay. I'm assuming your  
4 response to the point that the committee wants to maximize the  
5 value of this estate is that, in fact, creditors' committees  
6 very often look out for vendors who've received potential  
7 preferences, and often bargain on their behalf too, right?

8 MR. FISHER: Yes. But the rationale for the -- in  
9 terms of the costs that were saved as a result of the sealing,  
10 it's enormous costs to the estate, because hundreds of  
11 defendants who never ended up getting sued would have retained  
12 counsel, would have engaged in 26(f) conferences, would have  
13 begun to litigate preference cases that ultimately never saw  
14 the light of day.

15 And Ms. Schweitzer refers to how much it would cost to  
16 monitor the docket to find out whether there was an order that  
17 could potentially be of interest to a party that received a  
18 payment during the ninety days before Delphi filed for  
19 bankruptcy. Well, think about how much more it would cost in  
20 expenses, both to defendants and to the estate, if 742 cases  
21 that weren't going to get prosecuted were filed, served,  
22 counsel was retained, and litigation was begun.

23 THE COURT: Okay.

24 MR. FISHER: Unless Your Honor has further questions,  
25 I'll --

1 The movants' complaint that we haven't identified the  
2 specific debtor entity that made the transfer, and we haven't  
3 identified the specific transferee. And --

4 THE COURT: And that there's an antecedent debt.

5 MR. FISHER: An antecedent debt. And I think that the  
6 debtors have no choice but to concede that under Twombly and  
7 Iqbal, more detailed pleading would be required, at least  
8 according to some of the more recent cases, although, I don't  
9 know that there's a controlling case in this circuit yet  
10 describing exactly what that standard would entail.

11 And what we've attempted to do, and what we suggested  
12 in our opposition brief, was a practical way of cutting through  
13 this, and, essentially treating it as similar to a 12(e) motion  
14 and saying that to the extent that there's any defendant who  
15 cannot prepare its answer to this complaint, because knowing  
16 the date and the amount of the transfer is insufficient to  
17 allow it to track down the relevant information, we will  
18 supplement that and provide whatever additional information is  
19 needed in order to put them in a position to be able to respond  
20 to the complaint, which, at the end of the day, is what Rule 8,  
21 even after Twombly and Iqbal, is all about.

22 And so we're simply trying to be practical here.

23 THE COURT: Well, is there any -- two things. Is  
24 there any authority for the notion and -- I guess Twombly was  
25 after these were filed, too?

1 MR. FISHER: Yes.

2 THE COURT: Is there anything in the notion that you  
3 don't have to comply with them because it was filed beforehand?

4 MR. FISHER: I don't think that there's a case  
5 directly on point. Because, again, we have a situation where  
6 the case was filed before Twombly and Iqbal and then served  
7 after. I'm not aware of a case that's directly on point. So  
8 the question is how to bring these cases up to --

9 THE COURT: So then --

10 MR. FISHER: -- date with the new pleading standards.

11 THE COURT: Well, and on that, shouldn't there be a  
12 motion to amend? I mean, is there any authority for the  
13 mechanism you're proposing? I mean, if there's merit to the  
14 argument that you had filed these complaints under the laws  
15 that existed at the time, and there's, certainly, you know, the  
16 case law in the Southern District, was probably more on your  
17 side on that than not. As far as what you needed to show back  
18 then, wouldn't that just be a factor I'd take into account  
19 among other factors in your motion to amend? And then we'd  
20 have an amended complaint and everyone would know the complaint  
21 that they were looking to.

22 You know, if, in fact, you weren't able to show an  
23 antecedent debt, or you weren't able to show which debtor made  
24 the transfer, then, you know, there'd be a complaint that  
25 someone could move to dismiss even if, you know, I thought

- 204 -

1 there was enough to let the complaint be filed. But at least  
2 they'd see it as a -- and that could be one of their factors in  
3 objecting to the motion to amend, is that this complaint has no  
4 chance of succeeding because they still haven't identified the  
5 transferor, for example.

6 MR. FISHER: We think that's there's something very  
7 technical about the argument that's being made here. And that  
8 as a practical matter, based on the information that is  
9 supplied in the complaint, the movants are in an adequate  
10 position to respond intelligently to the complaint.

11 Sure, we could bring a motion seeking leave to amend  
12 these complaints. Alternatively, if the Court is going to rule  
13 that the complaints need to be replied to comply with the  
14 Twombly/Iqbal standard, we could do that.

15 THE COURT: Well, I guess I want to go back to my  
16 earlier question. I haven't seen a solution like the one  
17 you've proposed; do you have authority for that?

18 MR. FISHER: I don't have a case, Your Honor --

19 THE COURT: Okay.

20 MR. FISHER: -- that essentially converts a 12(b)(6)  
21 motion to a 12(e) motion. But conceptually that is what we had  
22 in mind. But if the problem is if 12(e) requires more  
23 information than what had been --

24 THE COURT: I think it's more than just having the  
25 defendant come to you and say I'm puzzled, I don't know how to

- 205 -

1 defend. I think it is an affirmative requirement to state a  
2 claim. And under Iqbal and Twombly and the cases, including  
3 Judge Gonzalez' case on preferences, there's certain key  
4 elements of the claim that require more than just the -- a  
5 recitation of the elements of the claim. I mean, that's really  
6 the -- that's really Twombly as opposed to Iqbal.

7 MR. FISHER: Right.

8 THE COURT: And that's, you know, basically, who made  
9 the transfer, and what was the antecedent debt? Something,  
10 other than just saying it was for antecedent debt. I mean, I  
11 think by listing the amount and the date, I think it was  
12 implicit that you're saying its defendant. But maybe I'm wrong  
13 about that. If you're asserting against some of the people 550  
14 relief then you probably should say how they got it.

15 MR. FISHER: Well, I think that it's just that --

16 THE COURT: Not immediate -- not the transferee but  
17 subsequent transferee relief.

18 MR. FISHER: The strange thing about applying Twombly  
19 and Iqbal to a preference case is that what does it mean to say  
20 that a preference claim is plausible? I mean, it's plausible  
21 that Delphi paid these defendants the amounts that are  
22 indicated on the complaint on the dates that are indicated.  
23 And it's plausible that those payments were on account of  
24 antecedent debt.

25 THE COURT: First of all, it's not Delphi, there's

- 206 -

1 like forty-two debtors here. So it's not listed who did this.  
2 I think that's important. And that leaves the issue of  
3 antecedent debt.

4 I'm somewhat sympathetic to your point on that,  
5 although, the three judges that have considered this, including  
6 Judge Gonzalez, aren't. They all emphasize the need to say  
7 something about the antecedent debt, other than the conclusory  
8 statement that there's antecedent debt. Your point is well,  
9 why would any of the debtors be paying anyone unless there was  
10 an antecedent debt?

11 Well, the thing is it may not be antecedent, they may  
12 be paying in advance, they may be paying that day; COD. You  
13 know, that's the response I think.

14 MR. FISHER: And, Your Honor, it is important to say  
15 which debtor entity we're talking about. It is important to  
16 say exactly which transferee we're talking about. As a  
17 practical matter --

18 THE COURT: Let me say -- I'm going to cut you short.

19 MR. FISHER: Yes.

20 THE COURT: As a -- it seems to me the problem with  
21 what you're proposing is that you may not have a basis to say  
22 in your books and records that -- at least for the face of the  
23 complaint, that defendant X was owed a debt, that this was a  
24 payment on account of you may not have it. And I think your  
25 method basically sort of puts the onus on them to make that

1 part of your case for you.

2 MR. FISHER: What we're trying to avoid, Your Honor,  
3 is a situation where we now go back and correct these  
4 complaints by identifying the specific entities where we think,  
5 as a practical matter, the movants know full well by checking  
6 their own records --

7 THE COURT: But that's not -- that's not -- I don't  
8 think that's the test, because, again, that shifts the burden  
9 of proof. You know, you basically force them to show we don't  
10 know.

11 MR. FISHER: Well, then, we go back and we provide  
12 them with this information. We could provide it to them in  
13 documentary form under 12(e), or we could provide it to them in  
14 the form of an amended complaint.

15 THE COURT: To me that's --

16 MR. FISHER: And then say it's a new motion to  
17 dismiss.

18 THE COURT: To me that's part of the merits of a  
19 motion to amend. If, in fact, they knew and it's no big deal  
20 and they know -- they've always known this, then that's a fact  
21 in your favor as well as the fact that the law changed. You  
22 know, but I think it should all be viewed in the context of a  
23 motion to amend.

24 Now, I have not reviewed every complaint. But as I --  
25 I've reviewed enough to see that I think they're form

1 Requiring for them to do all those things seems to me  
2 to be the minimum of fairness --

3 THE COURT: Well, look, it's a motion for leave to  
4 amend the complaint on unusual circumstances. It's really  
5 their risk if I turn them down again, right? So --

6 MR. WINSTEN: My only point was that it should be  
7 Iqbal plus, not Iqbal minus.

8 THE COURT: Well, I don't know what that means. And,  
9 frankly, I think the Supreme Court's been pretty careful not to  
10 turn Iqbal into a plus.

11 MR. WINSTEN: Right.

12 THE COURT: So --

13 MR. WINSTEN: But these are our --

14 THE COURT: But I think that the risk of being turned  
15 down on the basis of the complaint still isn't good enough is a  
16 serious enough -- the consequences of that are serious enough  
17 so I assume that the plaintiffs are going to be pretty careful.

18 MR. WINSTEN: A suggestion when we get there is that  
19 they ought to attach a draft --

20 THE COURT: Well, you have to do that.

21 MR. WINSTEN: Yes. So we know --

22 THE COURT: Yeah, absolutely.

23 MR. WINSTEN: -- what the form's going to be.

24 THE COURT: Got to do that.

25 MR. WINSTEN: Let me move to assumed contracts. This

- 277 -

1 re Hydrogen, LLC, 2010 WL 1609, 536 (Bankr. S.D.N.Y., April 20,  
2 2010). In re McLaughlin, 415 B.R. 23 (Bankr. D.N.H. 2009)  
3 In re Caremerica Inc., 409 B.R. 737 (Bankr. E.D.N.C. 2009).

4 I've stated during oral argument why I believe all  
5 three of these elements of the claim need to be pled with more  
6 clarity in the context. In particular, while it may seem at  
7 first glance that anyone receiving money has to receive it for  
8 some purpose and therefore it's reasonable to infer in the  
9 context that that purpose is to pay an antecedent debt, that is  
10 not always the case. Debtors may pay COD or in advance. And  
11 in addition, in identifying the debt, a complaint may therefore  
12 also enable a debtor to show that the creditor, or the  
13 transferee, rather, received more than it would otherwise in a  
14 Chapter 7 case which would, in the case of a contract that had  
15 been subsequently assumed, be a basis for dismissing the claim.

16 So I concluded that the complaints need to be  
17 dismissed, and I've given DPH Holdings forty-five days from  
18 today to file a motion for each complaint seeking leave to  
19 amend each complaint. That motion should attach the form of  
20 complaint -- or must attach the form of complaint that would be  
21 proposed to be filed as an amended complaint. And if such a  
22 motion is not filed for any particular complaint, that  
23 complaint will be dismissed upon the movant submitting to me a  
24 proposed order dismissing the complaint, CC'ing on the e-mail  
25 counsel for DPH and stating that in fact notwithstanding my